

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 23 OF 2007**

Shri Bimal Singh Kothari
having his office at 132,
Mittal Court, "B" Wing,
13th Floor, 224 Nariman Point
Mumbai – 400 021

... Petitioner

versus

1. State of Goa
(Through the Public Prosecutor).

2. Shri Mukhtar Ahmed Mohamud
Shaikh, resident of Anand,
Londhe Colony, Tasgaon-Ves,
Miraj, Sangli District
Maharashtra.

... Respondents.

Mr. Benny Joseph, Advocate for the Petitioner.

Ms. Winnie Coutinho, Public Prosecutor for the State/Respondent No.1.

Mr. M. B. Da Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for the
Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 6TH SEPTEMBER, 2007.

ORAL JUDGMENT

Heard learned Counsel on behalf of both parties.

2. Admit. By consent, heard forthwith.

3. In this petition, the Petitioner who is an accused in C. C. No. 271/OA/05/B, under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) assails the order of the learned Sessions Judge, Panaji upholding the order of issuing process against him by the learned J.M.F.C. for the said offence.

4. The Complainant had prosecuted the accused with the allegation that the Complainant had filed a Criminal Case bearing No. 200 of 2000 before the learned J.M.F.C. in Miraj in the State of Maharashtra against the accused and three others and the said case was settled thereafter and the accused along with the said three other persons had handed over six post-dated cheques in favour of the Complainant for a sum of Rs.1,50,000/- each pursuant to which the said Complainant withdrew the said case and the cheque in question dated 31-12-2004 for Rs.1,50,000/- drawn on ABN AMRO Bank, Mumbai, was presented by the Complainant for payment on Indus Ind Bank at Panaji in the State of Goa but the said cheque was dishonoured and returned unpaid with an endorsement "Cheque stop" and therefore the Complainant sent the notice dated 4-2-2005 which the accused replied, by his reply dated 23-2-2005 and therefore the Complainant filed the said complaint on 7-3-2005.

5. The cheque in question on the very face of it shows that it was issued by M/s. Kothari Global Ltd.(VP A/C) and was signed by the accused as its authorized signatory. Learned Counsel on behalf of the Petitioner/Accused

contends that the cheque in question was issued by the said Company which is a registered Company under the Companies Act, 1956 having its registered office at Calcutta. Learned Counsel further submits that the accused was a Director of the said Company upto 31-8-1988 when he resigned as a Director in the said Company and at the time when the cheque in question was issued the accused was the Company's authorized signatory and in that capacity had signed the said cheque and not in his individual capacity. Learned Counsel further points out that the Complainant instead of filing the complaint against the said Company chose to file the complaint against its authorized signatory, in his personal capacity and such a complaint was not maintainable. Learned Counsel further submits, referring to Section 141 of the Act, that there is no averment in the complaint to the effect that the accused was in charge of and responsible for the affairs of the said Company. Learned Counsel also submits that no notice as required under Section 138(b) of the Act was given to the Company and although it was given to the accused, the accused had replied to the same denying his liability to make payment under the said cheque.

6. On the other hand, learned Senior Counsel, on behalf of the Respondent No.2/Complainant contends that the accused nowhere in his reply dated 23-2-2005 had stated that the said cheque in question was not issued by him but was issued by the said Company, namely, M/s. Kothari Global Ltd. for which he was not responsible. Learned Senior Counsel further contends that the cheque was handed over to the Complainant by the accused and in case it was issued by the said Company that would be a matter which will have to be

gone into at the trial and regarding which it is the accused who would be required to give evidence.

7. As already stated, the cheque in question dated 31-12-2004 for Rs.1,50,000/- was issued on behalf of the said Company M/s. Kothari Global Ltd.(VP A/C) and was signed by the accused as its authorized signatory. At least till date no dispute has been raised that the said cheque was not handed over by the accused to the Complainant but nevertheless the fact remains that the said cheque was drawn not by the accused in his personal or individual capacity but by the said Company, namely, M/s. Kothari Global Ltd.(VP A/C).

8. One of the requirements of Section 138 of the Act, before a successful prosecution could be launched, is that the cheque is to be drawn by a person on an account maintained by him with a banker. Admittedly, the cheque in question was not issued on an account maintained by the accused in his personal capacity but was issued on an account maintained by the said Company, which has a distinct personality and which cannot be mixed with that of its authorized signatory. Another requirement for successful prosecution, is that a notice in writing is to be given to the drawer of the cheque, within 30 days of the receipt of information from the Bank regarding the return of the cheque as unpaid by the payee or the holder of the cheque. Presumably no notice was given to the Company because the said Company was not sought to be made an accused.

9. Since the cheque in question, on the very face of it, discloses that it was issued by the said Company, as its drawer, from an account maintained by it and not by the accused from the account maintained by him, no process could have been issued against the accused only because he had signed on behalf of the said Company as its authorized signatory.

10. Admittedly, the accused was also not prosecuted under Section 141 of the Act as the person who was in charge of, and was responsible to the Company for the conduct of its business. In any event, there was no averment or allegation made in that regard in the complaint and in the absence of it the accused could not be prosecuted. It is contended on behalf of the accused that the accused was only the Company's authorized signatory at Mumbai as the Company had its registered office at Calcutta.

11. In the above view of the matter, no process could have been issued against the accused under Section 138 of the Act. Orders of both the Courts below are hereby set aside. Process issued against the accused under Section 138 by Order dated 17-5-2003 is hereby quashed. Petition allowed on the above terms.

N. A. BRITTO, J.

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